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No. 78-538

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRANK CRIPPEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 10-13) is unreported. The opinion of the court of appeals (Pet. App. 14-26) is reported at 570 F. 2d 535. The opinion of the court of appeals denying rehearing (Pet. App. 27-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1978. A petition for rehearing was denied on August 31, 1978. The petition for a writ of certiorari was filed on September 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment sufficiently alleged that petitioner's false statements were material to the grand jury's investigation.

2. Whether the government cross-examined petitioner's character witnesses improperly.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623.[1] Petitioner received a sentence of 45 days' imprisonment and two years' probation, and fines totaling $20,000. The court of appeals affirmed (Pet. App. 14-26).

This case arises out of petitioner's testimony before a grand jury investigating violations of the Automobile Information Disclosure Act, 15 U.S.C. 1233, in March 1975 (Pet. App. 17-18; H. Tr. 19). At that time, petitioner denied any knowledge concerning turned-back odometers in cars for sale at his automobile dealership in Dade County, Florida (Tr. 58-59, 792-797; Pet. App. 1-6, 19):

Q. Are you aware of any cars being sold by Crippen Oldsmobile in 1974 that had odometers turned back?

A. No, I am not.

Q. Mr. Crippen, at any time in the year 1974 did you ever order or request anyone to turn back an odometer at Crippen Oldsmobile?

A. No, I did not.

[1]Petitioner was tried on four other counts as well. As to these, the court directed a verdict of not guilty on a count charging removal of a manufacturer's price sticker, in violation of 15 U.S.C. 1233(c). Thereafter, the jury acquitted petitioner on a third perjury count and two further counts charging obstruction of justice, in violation of 18 U.S.C. 1505.

Q. At any time in 1974 did Paul LaChance, while working on the premises of Crippen Oldsmobile here in Miami, turn back an odometer?

A. No, not that I know of.

At trial, LaChance, a mechanic who had done work for the dealership, testified that he had, with petitioner's knowledge, turned back the mileage on approximately 18 to 20 odometers at Crippen Oldsmobile in 1974 as part of a scheme to sell as new demonstrator cars with several thousand miles on them (Tr. 69, 90, 96-100). Indeed, on at least one occasion, petitioner specifically ordered that the mileage appearing on the odometer be reduced by half (Tr. 97-100). LaChance further testified that he had prepared false work orders and lied to the grand jury at petitioner's behest in order to cover up their illegal activities (Tr. 82-95). Other evidence corroborated LaChance's testimony (*e.g.*, Tr. 227-234; Gov't Exhs. 3-6).

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the indictment upon which he was convicted was fatally defective for failure to allege sufficiently the materiality of his perjury. The relevant perjury counts of the indictment (Pet. App. 1-2, 4-5)[2] set forth the statements of petitioner alleged to be perjurious and averred that such statements, made before a grand jury investigating "whether violations of the Disclosure of Automobile Information Laws and other statutes of the United States had been committed," were material "to determine who, if anyone, was removing and altering automobile manufacturer's labels on automobiles at Crippen Oldsmobile" and "to determine who, if anyone, was altering the odometer readings on automobiles at Crippen Oldsmobile * * * so that the

[2]Petitioner was acquitted on one of the three perjury counts (Count II). See note 1, *supra*.

odometers would not accurately reflect the actual mileage of the automobiles" (Pet. App. 1-2, 5). Since this indictment enabled petitioner to prepare a defense to the specific charges while adequately protecting him from future prosecutions for the same offense, both the district court and the court of appeals correctly rejected petitioner's argument on this point (Pet. App. 10-13, 25-26, 29-32). See, *e.g., Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

Nonetheless, petitioner claims that the indictment was deficient because it did not detail how turning back odometers was a material part of the scheme to remove and alter automobile stickers—the crime being investigated by the grand jury.[3] But this Court established long ago that a perjury indictment may generally aver that the perjurious statement was material to a pending specific inquiry and need not "set forth all the details or facts involved in the issue as to the materiality of such statement * * *." *Markham* v. *United States*, 160 U.S. 319, 324-325 (1895); accord, *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Sinclair* v. *United States*, 279 U.S. 263, 296-297 (1929). And here, the indictment sufficiently explained that petitioner's testimony pertained to suspected alterations of both stickers and odometers at petitioner's car dealership. See, *e.g., United States* v. *Crocker*, 568 F. 2d 1049, 1056-1057 (3d Cir. 1977); *United States* v. *Davis*, 548 F. 2d 840, 845 (9th Cir. 1977); *United States* v. *Bernstein*, 533 F. 2d 775, 786 (2d Cir.), cert. denied, 429 U.S. 998 (1976); *United States* v. *Rook*, 424 F. 2d 403, 405 (7th Cir.), cert. denied, 398 U.S. 966 (1970).[4]

[3]At the time of the grand jury investigation and indictment, tampering with an odometer was not, as it is now, a federal crime (Pet. App. 26 n.4). See 15 U.S.C. 1984, 1990c.

Petitioner claims that the court of appeals' decision here is in conflict with the Third Circuit's decision in *United States* v. *Slawik*, 548 F. 2d 75 (3d Cir. 1977). In that case, the court held that "a conviction under 18 U.S.C. 1623 may not stand where the indictment fails to set forth the precise falsehood alleged and the factual basis of its falsity *with sufficient clarity to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods.*" *Id.* at 83 (emphasis supplied). At the outset, we note that insofar as this language mandates more factual specificity in an indictment than is necessary to inform the defendant of the charges against him, including the elements of the crime, and to protect the defendant from future prosecutions for the same crime, the Third Circuit is in conflict with a well-established line of authority in this Court holding to the contrary. See, *e.g., Hamling* v. *United States, supra*; *Markham* v. *United States, supra.* In any event, we believe that careful analysis of the *Slawik* decision and a subsequent Third Circuit opinion strongly suggests that the Third Circuit would reach the same result on the facts of this case.

First, *Slawik* involved a defendant's ambiguous statements whose materiality to the ongoing grand jury investigation was not clearly alleged by the indictment. *Id.* at 79-84. The court, in reversing the defendant's

[4]As the court of appeals noted, if petitioner had desired more information concerning the factual proof establishing materiality in order to prepare his defense, he should have petitioned the trial court for a bill of particulars (Pet. App. 31). Accord, *e.g., United States* v. *Bernstein, supra.*

convictions, found that "so nebulous a legal and factual matrix" precluded "meaningful judicial review of the materiality of those falsehoods." *Id.* at 83-84. In contrast, petitioner made unambiguous statements to the grand jury falsely denying knowledge of an important operation in his ongoing illegal scheme. The materiality of these statements to the grand jury's investigation, which was readily perceived by both lower courts, was clearly identified in the indictment. In short, the cases are distinguishable because the instant indictment does permit "meaningful judicial review of the materiality of those falsehoods." See, *e.g.*, *United States* v. *Crocker*, *supra*.

Moreover, the Third Circuit has subsequently applied the *Slawik* standard, whatever that may be, to an indictment closely analogous to that in question here and upheld the conviction. See *United States* v. *Crocker*, *supra*. The indictment in *Crocker* merely alleged that the defendant, who was a director and disc jockey at a radio station, had testified falsely concerning his receipt of money from record industry figures, without explicating why such statements were material to the grand jury's investigation of criminal wrongdoing in the music industry. Similarly, here the indictment recited petitioner's falsehoods concerning his knowledge of a critical portion of the ongoing scheme which was the subject of the grand jury's investigation. The Fifth Circuit's conclusion below would thus appear consistent with the Third Circuit's analysis in *Crocker*.

2. Petitioner also argues (Pet. 12-14) that the prosecutor cross-examined his character witnesses improperly. Each of petitioner's several character witnesses testified as to petitioner's reputation for truth and veracity, and each was subsequently asked by the prosecutor whether his opinion would be affected by the fact that petitioner had admitted regularly turning back

odometers prior to 1973 (Tr. 672-673, 705-706, 710, 713, 734-740, 762-764).[5] These inquiries, which were based upon petitioner's testimony to the grand jury (Tr. 679-680, 696-698), are expressly authorized by the Federal Rules of Evidence. Fed. R. Evid. 608(b)(2), 405(a); 2 *Weinstein's Evidence* para. 405[02] (1977). Given the relevance of such dishonest and untrustworthy behavior to the witnesses' testimony concerning petitioner's veracity, the district court did not abuse its broad discretion in permitting the prosecution to impeach petitioner's character witnesses by inquiring as to their knowledge of petitioner's admitted odometer tampering. See, *e.g.*, Fed. R. Evid. 608(b), 404(a), 403; *Michelson* v. *United States*, 335 U.S. 469, 478-480 (1948); *United States* v. *Bynum*, 566 F. 2d 914, 919 (5th Cir. 1978). Finally, as the court of appeals noted, petitioner's claim of undue prejudice is belied by the fact that the jury acquitted petitioner on three of the five counts submitted to it (Pet. App. 20, 25).[6]

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[5]The district judge permitted this line of cross-examination only after hearing oral argument outside the presence of the jury as to the relevance, good faith basis and prejudicial effect of the proposed questions (Tr. 676-704, 717-724). Thereafter, he gave a limiting instruction to the jury concerning the purpose for which the cross-examination was permitted (Tr. 1037).

[6]Petitioner's reliance on *Shimon* v. *United States*, 352 F. 2d 449 (D.C. Cir. 1965), and *United States* v. *Curry*, 512 F. 2d 1299 (4th Cir. 1975), is misplaced. Those cases, which were decided before the Federal Rules of Evidence became effective, involved misleading cross-examination of character witnesses concerning alleged other crimes of the defendant which were far more prejudicial to the defendant than probative of his veracity. Here, of course, petitioner's admitted routine of selling cars with false mileage bears heavily on his veracity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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